U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: October 7, 1998
Case No. 98 INA 058

In the Matter of:

J. L. DAVIDSON COMPANY, INC., *Employer,*

on behalf of

ROBERTO P. PUNSALAN, *Alien.*

Appearance: Jack Golan, Esq., of Los Angeles, California, for Employer and Alien

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf OF ROBERTO P. PUNSALAN ("Alien") by J. L. DAVIDSON COMPANY, INC., ("Employer") under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act") and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the *Dictionary of Occupational Titles*, published by the Employment and Training Administration of the U. S. Department of Labor.

similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the State Employment Security Service ("SESA") and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On January 30, 1995, the Employer applied for alien labor certification on behalf of the Alien for the position of Civil Engineer/Reinforcing Steel in its business as a reinforcing steel subcontractor. The duties of the job were described by the Employer as follows:

> Plans, designs and directs civil engineering projects. Uses reinforcing steel products in concrete structures such as buildings, highways, bridges and water treatment facilities. Analyzes reports, drawings, blueprints and tests to plan and design project. Calculates cost and analyzes and determines feasibility of project applying knowledge and techniques of engineering and advanced math. Prepares or directs preparation of reports, specs, plans, construction schedules and designs. Inspects construction site to ensure conformance to plans, specs and building standards. Specializes in projects which use reinforcing steel products.

AF 25.[2] On the basis of the Employer's description, the job was classified as "Civil Engineer" under DOT Occupational Code No. 005.061-014.[3] The education required was a baccalaureate degree in Science in Civil Engineering as the Major Field of Study. The Employer required four years of experience in the Job Offered, and the Employer stated as "Other Special Requirements" in Box 15: "2 years of experience working with reinforcing steel." *Id*.[4] Although fourteen U. S.

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[2] The wage offered was $3,292, per month for a forty hour week from 8:00 AM to 5:00 PM, with overtime as needed at time and a half.

[3] 005.061-014 **CIVIL ENGINEER** (profess. & kin.) Plans, designs, and directs civil engineering projects, such as roads, railroads, airports, bridges, harbors, channels, dams, irrigation systems, pipelines, and powerplants: Analyzes reports, maps, drawings blueprints, tests and aerial photographs on soil composition, terrain, hydrological characteristics, and other topographical and geologic data to plan and design project. Calculates costs and determines feasibility of project based on analysis of collected data, applying knowledge and techniques of engineering, and advanced mathematics. Prepares or directs preparation and modification of reports, specifications, plans, construction schedules, environmental impact studies, and designs for projects. Inspects construction site to monitor progress and ensure conformance to engineering plans, specifications, and construction and safety standards. May direct construction and maintenance activities at project site. May use computer-assisted engineering and design software and equipment to prepare engineering and design documents. May be designated according to specialty or product. *GOE: 05.01.07 STRENGTH: L GED: R5 M5 L5 SVP: 8 DLU: 81*

[4] The Alien graduated college in the Philippine Islands with a baccalaureate degree in Civil Engineering in 1971. AF 127. His applicable work experience, which began in July 1977 and continued to the date of application, included jobs as a Senior Resident Engineer, Structure Engineer/Estimator, Senior Estimator, Project Supervisor, and Detailer, in

workers applied for the job, none of them was hired. AF 24.

Notice of Findings. On December 23, 1996, the Certifying Officer issued a Notice of Findings ("NOF") proposing to deny certification. AF 20-23. (1) The CO said the Special Requirement of two years' experience of working with reinforcing steel was unduly restrictive in that it was not normally required for the successful performance of the job in the United States, and would preclude the referral of otherwise qualified U. S. workers, citing 20 CFR § 656.21(b)(2)(i)(A). The CO added, "The job described in box 13 indicates 'reinforcing steel products in concrete...' but you refuse to consider applicants with experience with reinforced concrete. Which is reinforced: the steel? or the concrete?" (2) Questioning the *bona fides* of the application, the CO noted that its unduly restrictive hiring criteria indicated that it was tailored to the unique experience of the Alien and reiterated that as a consequence the job was not "clearly open to any qualified U. S. worker" under 20 CFR § 656.20(c)(8). (3) The CO found that the record indicated that the Employer had rejected U. S. workers Chan, Haghani, Katyal, Manual, and Rosal for reasons that were neither lawful nor job-related, citing 20 CFR §§ 656.21(b)(6) and 656.21(j)(1)(iii) and (iv). In addition, under 20 CFR § 656.24(b)(2)(ii) the CO said the resumes of U. S. workers Cvitannic, Galdamez, Misirian, Yang, and Zargurian showed that the combinations of their education, training and/or experience would enable them to perform the usual job duties of a Civil Engineer, adding that they were basically qualified for this occupation as it was described in the DOT. AF 22-23.[5] The CO then specified the evidence necessary to rebut the findings set out in the NOF.

Rebuttal. The Employer filed its rebuttal on January 21, 1997. AF 05-19. (1) The Employer said the job requirements were not unduly restrictive, that the job was not specially created for he Alien, and that the U.S. workers named in the NOF were rejected because they were not qualified. The Employer's documentation and argument emphasized that it specialized in providing services and products related to reinforced concrete and reinforcing steel. The Employers argument relied on the last clause in the DOT position description, "May be designated according to specialty or product." Its principal contention was, "As a result of this, it is only obvious that if the employer specializes in reinforced concrete, the Civil Engineer must also be specialized in the reinforcing steel product that goes into the concrete, to be able to perform his/her job duties." Based on this reasoning, the Employer argued that its requirements did not exceed the qualifications described in the DOT that are normally required for the job in the United States under 20 CFR § 656.21(b)(2)(i)(A), citing **Lebanese Arak Corp.**, 87 INA 683

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the employment of the Government of Nigeria and of several United States firms that constructed roads, bridges, buildings, and various types of concrete structures. In 1990 his work as a detailer for a firm of consulting engineers in Canada included the drafting of detailed drawings of reinforced steel parts of apartment complexes, office buildings, waste water treatment plants, bridges, and commercial and industrial buildings for an engineer's approval. The Alien engaged in similar work from April to November 1994, when he was employed as a detailer in Bakersfield, California. AF 128-129.

[5] 20 CFR § 656.24(b)(2)(ii) required the CO "consider a U. S. worker able and qualified for the job opportunity if the worker by education, training, experience or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U. S. workers similarly employed."

(Apr. 24, 1989(*en banc*) and **Information Industries, Inc.,** 88 INA 082 (Feb. 9, 1989)(*en banc*). The Employer then discussed the NOF finding that it had rejected the U. S. workers as unqualified solely because the job requirements to be restrictive, contending (1) that it was not unduly restrictive to require experience in its business specialty and (2) that no willing and available candidate was qualified to perform the job described in its application. The Employer's rebuttal argument was supported by the written statement of C. E. Grady, its vice president for operations, who discussed its work as a reinforcing steel subcontractor and reviewed in detail his reasons for rejecting all of the U. S. workers referred. Employer contended that most of the U. S. job applicants were Structural Engineers and not Civil Engineers, and at AF 13 furnished its own definitions to differentiate the two occupations.[6] The Employer relied on the distinction it perceived as the primary basis for its rejection of the U. S. workers named in the NOF, all of whose resumes had indicated that they were apparently qualified for the job.

Final Determination. The CO issued a Final Determination denying certification on February 19, 1997. AF 03-04. (1) As the CO found the job was specially created for the Alien, the Employer was directed by the NOF to submit evidence establishing that before the Alien was hired the job existed and was previously filled subject to the same requirements. The NOF said such documentary proof should include position descriptions, organizational charts, payroll records, etc.[7] In the Final Determination the CO found that the Employer failed to document either that it had in the past hired workers subject to the same terms and conditions as those required on the Form ETA 750A it filed as its application for alien labor certification, or that a major business change required the creation of this position. The Employer's response, said the CO, was in the statement by Mr. Grady, who denied that the job was created for the Alien on the basis of a business card as the sole supporting documentation.[8] Based on this issue, the CO said the Employer had failed to respond to the NOF, and concluded that the NOF finding was the final determination denying certification.

(2) In discussing the Employer's argument on the unduly restrictive requirement, the CO said the NOF had indicated that the job described in the application was for the use of reinforcing steel in concrete, and not for experience in the engineering and preparation of the steel, itself. Noting that the Employer had argued that experience in the use of reinforcing steel in concrete and experience in the steel, itself, were "two specific specialties" that the Employer contended were "not interchangeable," the CO said Employer's assertions in this argument were

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[6] 005.061-034 **STRUCTURAL ENGINEER** (construction) Directs or participates in planning, designing, or reviewing plans for erection of structures requiring stress analysis: Designs structures to meet estimated load requirements, computing size, shape, strength, and type of structural members, or performs structural analysis of plans and structures prepared by private engineers. May inspect existing projects and recommend repair and replacement of defective members or rebuilding of entire structure. *GOE: 05.01.08 STRENGTH: L GED: R5 M5 L5 SVP: 8 DLU: 77.*

[7] In the alternative, the Employer could show that before the Alien was hired that it experienced a major change in its business operation that caused the job to be created.

[8] See AF 11. Employer's statement referred to Construction Management Enterprises which, Mr. Grady said, had formerly provided drawings and schedules, and other engineering services.

not documented. In fact, added the CO, all of the Alien's own experience was in reinforced concrete, as was the experience of most of the U. S. applicants, as Mr. Grady contended. Because the Special Requirement in box 15 of Form ETA 750 A was not justified by the Employer, it did not comply with the regulations, concluded the CO.

(3) Addressing the rejection of the named U. S. workers who were referred for the position, the CO said the Employer's rebuttal simply contended that candidates with structural steel backgrounds did not qualify as civil engineers. The DOT distinguished between the work of a Structural Engineer and a Civil Engineer on the basis of stress analysis, which appeared to be the focus of the job description of the Structural Engineer.[9] The CO added, "Since the job described involves testing and analysis of reinforced concrete structures, we are not convinced of your reasons for disqualifying structural engineers, especially in the light of your failure to produce any **documentation** [that] the steel and concrete specialties are 'not interchangeable.' " (Emphasis as in the original at AF 04.) Noting that the level of the skills of Chan, Haghani, Katyal, Manual, and Rosal met and exceeded the skill level of the job described at box 13, the CO said the Employer's distinction was based on job titles, rather than on job duties. The same reasoning applied to Cvitannic, Galdamez, Misirian, Yang, and Zargurian, whom the Employer failed to interview, continued the CO, who said the Employer should have interviewed these workers because their resumes showed histories of performance in the main points of the job Employer's application described.

Appeal. Employer requested administrative-judicial review by letter dated March 11, 1997. AF 01-02. The Employer later filed a brief which traversed the reasons for rejection of the application for alien labor certification in the Final Determination, repeating and rearguing points initially discussed in rebuttal and attaching new evidence. The new evidence that the Employer's brief offered is untimely and cannot be considered. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992.)

Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, the employer must comply with the Act and regulations when it seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. After examining the application, NOF, rebuttal, Final Determination and the appeal, the Panel agrees that the evidence of record supported the CO's finding that the Employer failed to engage in a good faith recruitment effort. **H. C. LaMarche Enterprises**, 87 INA 607(Oct. 27, 1988).

The facts of this case are consistent with the regulatory provision that an employer's use of unduly restrictive job requirements in the certification process must be rejected under 20 CFR § 656.21(b)(2), unless such requirements are adequately documented or otherwise explained as

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[9]See Footnotes, *supra.*

arising from business necessity. The job duties that this Employer described in box 13 and in its job title, "Civil Engineer," matched the DOT position description for a Civil Engineer at 005.061-014, but for the Employer's added special requirement of two years of specialized experience in box 15. **Information Industries, Inc.**, 88 INA 082 (Feb. 9, 1989) (*en banc*), explained that the requirement must bear a reasonable relationship to the occupation in the employer's business, and that such a job requirement must be essential to performing in a reasonable manner the job duties described by the employer in box 15. The Employer's undocumented rebuttal discussion of the distinction between a Civil Engineer and a Structural Engineer by Mr. Grady, was not persuasive.[10] As his written statement in behalf of the Employer was the bare assertion of the employee of an interested party without supporting objective evidence beyond the opinion of that employee, his analysis was not sufficient to carry the Employer's burden of proof. **Gencorp**, 87 INA 659(Jan.13, 1988)(*en banc*); and see **Carl Joecks, Inc.**, 90 INA 406(Jan. 16, 1992). Upon comparing the Special Requirement in box 15 with the job duties described in box 13, we agree with the CO's finding that the work of a Civil Engineer that the Employer's application described in detail in box 13 was not proven to require the two years of added background that box 15 mandated. Moreover, we also agree that the experience in working with reinforced concrete described in one or more of the U. S. workers' resumes was the background that this application demanded. In the absence of the rebuttal proof that the NOF specified for this unduly restrictive job requirement, the Employer failed to establish that its hiring criterion in box 15 of Form ETA 750 A bore a reasonable relationship to the occupation described in box 13, or that it was essential to performing in a reasonable manner the job duties of a Civil Engineer that it had described in its application. Consequently, we conclude that the evidence supported the CO's finding that the Special Requirements of box 13 were unduly restrictive. **Aguarius Enterprises**, 87 INA 579 (Mar. 24, 1988).

The CO's findings as to whether the Employer's job qualifications were restrictive under 20 CFR § 656.21(b)(2)(i)(A) were critical to the inference that the U.S. workers were rejected for reasons that were not lawful or job-related, the final issue considered in this appeal. Moreover, an employer's rejection of a U. S. worker who satisfies the minimum requirements specified in Employer's ETA 750A and advertisement is unlawful, since 20 CFR § 656.24(b)(2)(ii) provides that an applicant who meets the minimum requirements specified by the employer's application for labor certification is considered qualified for the position. **The Worcester Co, Inc.,** 93 INA 270 (Dec. 2, 1994).[11] Even if a U. S. job applicant's resume does not meet all of the job requirements, if the worker's resume shows a broad range of experience, education, and training, the reasonable possibility arises that he is qualified. **Dearborn Public**

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[10]Neither the Employer's founder, Board chairman, and chief executive officer, J. L. Davidson, nor the vice president of operations who signed the rebuttal statement, C. E. Grady, nor any of the Employer's other nine officers and primary managers, whose official biographies were provided at AF 157-160 as part of Employer's application, claimed to be a Civil Engineer or claimed that he had either the academic qualifications or the specific professional training in civil engineering that the Alien described in the Form ETA 750B or that the Employer required as job qualifications in Boxes 13, 14, and 15 of Form ETA 750A.

[11] Also see **American Cafe**, 90 INA 026(Jan. 24, 1991).

Schools, 91 INA 222 (Dec. 7, 1993) (*en banc*); **Gorchev and Gorchev Design,** 89 INA 118(Nov. 29, 1990(*en banc*).[12] In rebutting the NOF with its undocumented distinction based on job titles rather than on job duties, the Employer failed to explain its rejection of U. S. job applicants Chan, Haghani, Katyal, Manual, and Rosal, even though their education and experience matched and exceeded the skill level of the job, the core duties of which were fully described at box 13 of Form ETA 750 A. In addition, the Employer's reliance on an unduly restrictive job requirement could not justify its failure to interview Cvitannic, Galdamez, Misirian, Yang, and Zargurian, all of whom it rejected as unqualified on grounds that they did not meet the Other Special Requirement in box 15. See 20 CFR §§ 656.21(b)(1)(i)(E) and 656.21(b)(2)(a) and (b). The resumes cited above indicate that one or more of the U. S. job applicants for the position Employer offered was qualified and was available to be hired, even though the Employer rejected all of the candidates referred.

After examining the application, NOF, rebuttal, Final Determination, and Employer's appeal, the Panel agrees that the evidence supported the CO's finding that the Employer's job classifications were undocumented, that its rejection of the qualifications of the U. S. workers based on its qualification criteria was not based on objective reasons, and that it failed to prove that it engaged in the good faith recruitment effort required by the Act and regulations. **H. C. LaMarche Enterprises**, 87 INA 607(Oct. 27, 1988). Consequently, the denial of certification must be affirmed, and the following order will enter.

Order

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

[12]Although the alien appears well qualified for the job and may even be better qualified for the position than any of the U.S. applicants, it is well settled that an employer cannot reject U.S. applicants on that basis. **K Super KQ 1540-A.M.**, 88-INA-397(Apr. 3, 1989)(*en banc*); **Morris Teitel**, 88-INA-9(Mar. 13, 1989)(*en banc*).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.